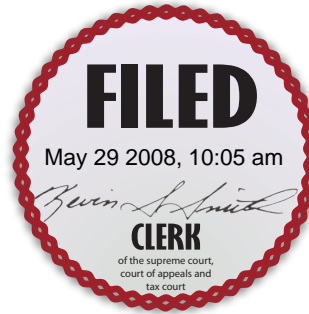


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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ABJUL K. JOHNSON,  
  
Appellant-Defendant,

vs.

STATE OF INDIANA,  
  
Appellee-Plaintiff.

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No. 20A03-0710-CR-472

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APPEAL FROM THE ELKHART CIRCUIT COURT  
The Honorable Gene R. Duffin, Senior Judge  
Cause No. 20C01-9603-CF-12

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**May 29, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**DARDEN, Judge**

## STATEMENT OF THE CASE

Abjul K. Johnson appeals the trial court's order denying him permission to file a belated appeal.

We affirm.

## ISSUE

Whether the trial court abused its discretion by denying Johnson permission to file a belated appeal.

## FACTS

On March 12, 1996, the State filed an information alleging that on March 6, 1996, eighteen-year-old Johnson and two confederates had committed robbery while armed with a deadly weapon, a class B felony. On September 5, 1996, the State amended the information to allege robbery resulting in serious bodily injury, a class A felony. On September 26, 1996, Johnson presented to the trial court a plea agreement whereby he “would plead guilty to Robbery, a Class A felony, which is Robbery Resulting in Serious Bodily Injury,” and the trial court would determine a sentence in the range of “45 to 50 years.” (Tr. Ex. A, p. 3). A factual basis was established, and the trial court accepted his plea and entered judgment of conviction. On January 9, 1997, the trial court conducted the sentencing hearing. It found “as aggravating factors” that Johnson “was a member of a gang; that multiple persons were injured . . . as a result of” the actions of Johnson and his confederates; and that “weapons were involved.” *Id.*, p. 26. It further found Johnson’s age to be “a mitigating factor,” and concluded “that the aggravating factors

outweigh[ed] the mitigating factor.” *Id.* The trial court sentenced Johnson to a term of fifty years.

Shortly after Johnson began serving his sentence, he requested a transcript from the trial court. Transcripts were sent to him on October 29, 1997. On September 14, 2000, Johnson filed a pro se petition for post-conviction relief, which contained no challenge to his sentence, and the trial court appointed the State Public Defender to represent him on the petition. On March 13, 2001, Johnson filed a pro se “Motion to Supplement Petition for Post-Conviction Relief, and Motion to Correct Erroneous Sentence,” (App. 64), in which he argued that the trial court had erred in sentencing him.

On May 25, 2006, Johnson’s appointed counsel filed a petition seeking permission to file a belated appeal. The petition asserted that at the September 16, 1996, guilty plea hearing, Johnson had not been advised of his right to appeal his sentence, and that he was “not at fault and ha[d] been diligent in requesting permission to file a belated notice of appeal.” (App. 95). Johnson’s affidavit, attached to his petition, stated that he “would like to pursue a belated direct appeal . . . because [he] was not notified that [he] had a right to appeal [his] sentence.” (App. 111). The State filed an objection.

On June 29, 2007, the trial court held a hearing on Johnson’s petition. The transcript of Johnson’s guilty plea and sentencing hearings were admitted. Johnson testified that he had never been advised of his right to appeal his sentence. Johnson also testified that he had requested his transcript after the sentencing and had received it in 1997, but did not file his petition for post-conviction relief until almost three years later. Johnson further testified that the delay was a result of his lack of access to legal materials

and the law library from August of 1997 until July of 2000 because he was “on a segregated lock-up unit” where he “was locked up for misbehaving.” (Tr. 16). Johnson also testified that he was “fairly smart” and had been “a fast reader” even at age eighteen. (Tr. 10, 11). Finally, Johnson testified that when he learned in 2005 that he could pursue a direct appeal of his sentence, he instructed his counsel do so.

On August 16, 2007, the trial court issued its order denying Johnson’s petition. The trial court found that Johnson “never filed a notice of appeal and did not file his petition for post conviction relief until September 14, 2000, nearly four years after he was sentenced.” (App. 154). The trial court noted that Johnson attributed this delay to his lack of access to a law library “between August 1997 and July 2000” when “he was locked up as part of administrative segregation at the prison.” *Id.* The trial court found that Johnson had not established that he was without fault in the delay of filing and was diligent in requesting permission to file a timely notice of appeal.

### DECISION

In *Collins v. State*, 817 N.E.2d 230 (Ind. 2004), our Supreme Court “made clear that the proper vehicle for raising a sentencing issue” on a conviction that resulted from the defendant’s plea of guilty “was a direct appeal and not a post-conviction proceeding.” *Moshene v. State*, 868 N.E.2d 419, 421-22 (Ind. 2007). “Indiana Post-Conviction Rule 2(1) provides a defendant the opportunity to petition the trial court for permission to file a belated notice of appeal.” *Id.* at 422. Upon a conviction after a plea of guilty and “fail[ing] to file a timely notice of appeal,” the defendant may nevertheless file “a belated notice of appeal.” P.C.R. 2(1). This procedure is available to the defendant where

- (a) the failure to file a timely notice of appeal was not due to the fault of the defendant; and
- (b) the defendant has been diligent in requesting permission to file a belated notice of appeal under this rule.

*Id.*

“The defendant bears the burden of proving by a preponderance of the evidence that he was without fault in the delay of filing and was diligent in pursuing permission to file a belated motion to appeal.” *Moshenek*, 868 N.E.2d at 422-23. The fact that the trial court did not advise the defendant of the right to appeal a sentence after an “open plea” can establish that a defendant was without fault in the delay of filing a timely appeal. *Id.* at 424. “However, a defendant still must establish diligence.” *Id.* Several factors are relevant to the “diligence” inquiry, including “the overall passage of time; the extent to which the defendant was aware of relevant facts; and the degree to which delays are attributable to other parties.” *Id.*

Where the trial court held a hearing on the defendant’s petition for permission to file a belated appeal, the trial court’s ruling thereon “will be affirmed unless it was based on an error of law or a clearly erroneous factual determination (often described in shorthand as ‘abuse of discretion’).” *Id.* at 423-24. This follows because the trial court “is in a better position to weigh evidence, assess witness credibility, and draw inferences.” *Id.* at 424.

Johnson first argues that the trial court “abused its discretion when it found that [he] was at fault for failing to timely file a notice of appeal challenging his sentence.” Johnson’s Br. at 7. However, the trial court did not find that Johnson was “at fault,” *id.*,

but that he had not established that he “was without fault and diligent.” (App. 154). As noted above, the fact that a trial court does not advise a defendant who is pleading guilty of his right to appeal the sentence imposed “can establish that the defendant was without fault in the delay of filing a timely appeal.” *Moshenek*, 868 N.E.2d at 424. Here, the trial did find that Johnson was “not affirmatively informed” of this right. (App. 154). However, Johnson’s “burden” was to “prov[e] by a preponderance of the evidence that he was without fault in the delay of filing and was diligent in pursuing permission to file a belated motion to appeal.” *Moshenek*, 868 N.E.2d at 422-23 (emphasis added). Therefore, Johnson’s first argument fails.

Johnson also argues that the trial court abused its discretion when it did not find that he was diligent in requesting permission to file a belated appeal. Johnson admitted that from August of 1997 until July of 2000, his own misbehavior had resulted in his inability to access legal resources. In *Moshenek*, our Supreme Court identified some “factors” relevant to the inquiry of whether the defendant was “diligent” in filing a timely appeal to include “the overall passage of time; the extent to which the defendant was aware of relevant facts; and the degree to which delays are attributable to other parties.” 868 N.E.2d at 424. The overall passage of time extends from Johnson’s sentencing in January of 1997 until his petition was filed in May of 2006.<sup>1</sup> However, the delay from

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<sup>1</sup> Johnson cites *Baysinger v. State*, 835 N.E.2d 223 (Ind. Ct. App. 2005), *trans. denied*, for the proposition that a similar period of delay resulted in the reversal of the trial court’s denial of permission to file a belated notice of appeal. However, our Supreme Court found that unlike in *Moshenek*, the trial court in *Baysinger* “did not hold a hearing before denying the defendant’s petition,” and, therefore, the *Baysinger* trial court’s determination was “owed no deference.” *Moshenek*, 868 N.E.2d at 424. Because the trial court here held a hearing, we do not find reference to the facts in *Baysinger* persuasive.

August of 1997 until July of 2000 is a delay attributable only to Johnson, as it was a direct result of his behavior. Further, when he filed his pro se petition for post-conviction relief in September of 2000, he did not raise any sentencing issue. *Moshenek* observed that “a pre-*Collins* Post-Conviction Rule 1 challenge to a sentence can serve to establish diligence,” 868 N.E.2d at 424, but it was not until March of 2001 that Johnson took any action to challenge his sentence. Based upon the facts established by the record and testimony before it, we cannot conclude that the trial court abused its discretion when it found Johnson had failed to establish that he was “diligent” in seeking permission to file a timely notice of appeal. (App. 154).

Affirmed.

NAJAM, J., and BROWN, J., concur.